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No. 485.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

RUSSELL MOTOR CAR COMPANY,
Appellant,

vs.

UNITED STATES,
Respondent.

BRIEF OF AMICUS CURIAE.

LOUIS TITUS,
Amicus Curiae.

Westory Building,
Washington, D. C.

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BRIEF OF AMICUS CURIAE.

The plaintiff in the court below, the appellant here, entered into a written contract May, 1918, with the United States, to furnish certain gun mounts to the United States. The contract was made for the United States by the Acting Secretary of the Navy. In November, 1918, this contract was cancelled by the Secretary of the Navy.

The plaintiff, after some negotiations, brought this suit against the United States, claiming damages on account of such cancellation, including in such damages a claim for anticipated profits.

The Respondent contends that this cancellation was authorized by the Act of June 15, 1917. It is of course well established law that where the United States cancels its own contract, without default on the part of the other party, the United States in such case is liable for the full amount of damages sustained, including anticipated profits, where such profits are a matter of reasonable certainty and properly proven. In other words, the liability of the United States in such a case is exactly the same as would be the liability of an individual under like circumstances.

United States vs. Purcell Envelope Co., 249 U. S. 313 and cases therein cited.

I do not pursue this matter further or cite further authorities because I understand that it is conceded that such is the law and that this general principle of law would be applicable to this case were it not for the provisions of the Act above mentioned. The sole defense to this action is that the provisions of this Act authorize the Government to cancel its own contracts and therefore the effect is the same as if there were written into the contract itself a clause permitting such cancellation.

ACT OF JUNE 15, 1917.

The Act of June 15, 1917, was an act making appropriations for military and naval purposes. The provisions relied upon by the Respondent are found under the sub-head, "Emergency Shipping Fund." The portions of the Act applicable to this case are as follows:

"Emergency Shipping Fund."

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

* * * * * * * * *

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions

hereof, it shall make just compensation therefor, to be determined by the President, etc.

* * * * * * * * *

The President may exercise the power and authority hereby vested in him and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time.

* * * * * * * * *

All authority granted to the President herein, or by him delegated, shall cease six months after a final treaty of peace is proclaimed between this Government and the German Empire."

PROPOSITION I.

The word cancel as used in this law does not apply to Government contracts, but applies exclusively to private contracts.

In determining whether subdivision "b" of the Emergency Shipping Fund paragraph of this Act authorizes the President to cancel Government contracts as well as private contracts, the situation of the country at the time the law was passed must be taken into consideration. The United States had just entered the great war. Ships were one of the first essentials to the successful prosecution of that war. The shipyards of this country were at that time filled with ships being constructed for foreign nations or the citizens of foreign nations. Many of such ships were being constructed for nations who were neutrals in the war. It was obviously desirable that the Government should have in the words of the statute power to "modify, suspend, cancel or requisition" such contracts, and to have the same power as to future contracts, if any such

contracts should be thereafter made. All of these powers were manifestly given for the purpose of expediting the construction of ships for the United States. It might be desirable to "requisition" some contracts and take them over for the United States. It might be desirable to "cancel" some contracts entirely, and thus clear the ways for the construction of ships for the United States. It might be desirable in the case of some contracts to "suspend" them during the time that the United States should make use of the plant. And it might be desirable in other cases to merely "modify" the contracts either as to the number of ships, the amount of material, the time of delivery, or as to some other feature, but any and all such modifications to serve the paramount necessity of the United States to secure ships. The sole purpose of Congress when this Act was passed was to get ships and to devise ways and means of getting them. Congress was not then thinking of a way to get rid of ships nor of a way to get rid of contracts for ships, nor of a way to save money by getting rid of such contracts. But it was thinking of the great necessity of getting ships and the necessity of granting the President all the power that could be advantageous for such purpose.

These powers which Congress granted are found in an *appropriation* bill. The law is entitled "An Act making appropriation to supply urgent deficiencies in appropriations for military and naval establishment," etc.

The Emergency Shipping Fund provision starts out with an authorization to the President to do certain things. With some condensation, it is as follows:

"The President is hereby authorized and empow-

ered, *within the limits of the amounts herein authorized* (italics ours),

> (a) To place an order for ships or material.
>
> (b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production or purchase of ships or material.
>
> (c) To require the owner of any shipbuilding plant to place the output of such plant at the disposal of the United States.
>
> (d) To requisition, for the use of the United States, any plant.
>
> (e) To purchase, requisition or take over any ship or charter of such ship.

These constitute the sum total of what the President is authorized to do. It will be noted, first, that the authorizations are in an appropriation bill. It will also be noted that the President is only authorized to do these various things "within the limits of the amounts herein authorized." Apparently Congress was of the opinion that the exercise by the President of any of the powers granted would require money. If he placed an order for ships it would require money. If he took over the output of a plant it would require money. If he took over a ship or charter it would require money, and likewise if he modified, suspended, cancelled or requisitioned any contract it would also require money. It must therefore be apparent that the contracts which he was authorized to cancel were not contracts which the government had made but were contracts made by other persons, because to cancel a government contract would not require further money but would save the government money. Otherwise, there would be no object in cancelling the contract.

The debates and discussions in Congress, so convincingly set forth in the other briefs on file herein, show conclusively that Congress had in mind that it was private contracts that were to be "modified, suspended, cancelled or requisitioned."

The purpose, of course, in cancelling any government contract is to save the government the expenditure of the money required by the contract. It would seem positively absurd for Congress to appropriate money to enable the Government to cancel its own contract; but the appropriation of money was necessary if the contracts to be cancelled were private contracts. So then, Congress, contemplating that the cancelling of a contract would require money, made an appropriation for that purpose and provided further on in the Act that:

> "Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter or material in accordance with the provisions hereof, it shall make just compensation therefor, etc."

Notwithstanding this manifest interpretation of the law, the Court of Claims has decided that the word "cancel" applies to Government contracts, basing its opinion in this respect on two arguments:—

1st. The word "modify" used in subdivision "b" of the Emergency Shipping Fund provision, must necessarily apply to Government contracts, and it is therefore reasonable to assume that Congress intended the word "cancel," used in the same subdivision, also to apply to Government contracts.

2nd. As the power to cancel contracts extended for six months after final peace, the power to cancel must apply to Government contracts as there could be no object in canceling private contracts after final peace.

Answering these two contentions in their order:

1st. The word "modify" is applicable to private contracts.

The Court of Claims argues that the authority to modify could only apply to Government contracts because if applied to a private contract there would be no contract left and moreover no government purpose could be served by modifying a private contract. This is obviously false reasoning. Suppose, for example, a shipyard had a contract for ten ships that could only be used in inland waters and were not ocean going ships. Suppose further that five of these ships were almost completed and five not commenced. Who can doubt that the President under this power could modify this contract, allowing the first five ships to be finished and eliminating the remaining five from the contract?

Take another example, suppose a ship is being constructed in an American yard for an American citizen. The Government does not, we will say, desire to requisition the ship itself nor the contract for the ship, but desires to requisition the use of the ship after its completion. (Which, incidentally, is exactly what the Government did in many cases.) The date of delivery, however, fixed in the contract does not suit the Government. It desires an earlier delivery, and feeling convinced that it is possible for the yard to expedite the work, it modifies the contract by ordering an earlier delivery. Can there be any question that under this law the President would have authority to "modify" the contract in that respect. Of course if it cost the yard any money to advance the delivery, the Government must pay the bill, because the same law also provides that whenever the Government shall modify

or cancel a contract it must make "just compensation therefor." But the point is, that in the cases cited and others that will readily occur to the mind, the Government might well and with an easily understood purpose modify a private contract, although the Court of Claims says that the "Power and the purpose (to modify a private contract) are beyond conception."

It must be borne in mind further that the contract itself provides in elaborate detail for its own modification and the limits beyond which such modification can not go. If the theory of the Respondent is correct and this law allows the modification of Government contracts, then the provisions of this contract limiting the right to modify are illegal. Neither the appellant nor the Government understood that this section authorizing the modification or cancellation of contracts applied to Government contracts, for had they so understood, it would have been idle to have said anything at all about modification, and most certainly they would not have limited the right to modify in the teeth of a law permitting unlimited modification.

Let us examine this proposition a moment and see where it lead us. There is no limit placed upon the word "modify" in the statute. If the Government under this law can modify its own contract, then it can modify it in any and every respect. Consider for example a contract for the construction of ships. The contract is negotiated with great care as to the number of ships, the kind of ships, the size, the speed, the dates of completion and the price. If the President has a right to modify under this law then none of these carefully drawn provisions mean anything at all. The very next day without consulting the contractor, the President can reduce or increase the number of ships.

He can change a freight ship to a passenger ship, a passenger ship to an oil tanker, or a tanker to a collier. He can change a slow boat to a fast one, or a fast boat to a slow one. He can advance or retard the dates of delivery and finally he can reduce the price or advance it at will. In other words if the contention of the Court of Claims is correct and the word "modify" applies to Government contracts then all such contracts say this, that the contractor will build any kind of a ship, of any capacity, of any speed, of any design, deliver them at any time and accept any terms of payment and any price that the President may determine. Moreover one modification does not end the matter, the President can go on modifying from day to day. He can reduce the price this month and still further reduce it next month. No contractor outside of a home for feeble minded could be induced to sign such a contract. It is bad enough to apply the right to cancel to Government contracts, but it is infinitely worse to so apply the right to modify. In the case of cancellation the contractor at least knows his status, for when a contract is cancelled, it is cancelled and there is an end to the matter. But when a contract is modified it is still subject to further and never ending modifications. Writing into a Government contract the right to cancel would be bad enough, but writing into it the right to modify would be disastrous.

It is manifest that the Court of Claims' contention that the word "modify" must apply solely to Government contracts is a misconception of the law, and that the only reasonable interpretation is that it applies solely to private contracts.

2nd. Six months' extension of powers after peace does not imply that word "cancel" applies to Government contracts.

The Court of Claims further argues that the word "cancel" must apply to Government contracts because the power to cancel was to continue for a period of six months after a final treaty of peace; and that there could be no object after peace in cancelling private contracts, because the war would then be over and the necessity for ships gone. With equal force, it could be argued that the power to build ships, to contract for ships and material, to requisition ships and ship yards, should have ceased with the war as the necessity was gone. Yet Congress saw fit to extend all these powers for a period of six months after final treaty of peace. May it not well be that Congress realizing the United States would have millions of men and vast stores of material in Europe, thought there might still be necessity even after peace to bring back these men and material and that ships might be necessary for that purpose? Suppose for example, that some ship particularly desirable for such purpose, after final treaty of peace, was still being constructed for a private company; it is not beyond the bounds of reason that the United States should wish to cancel the contract for such ship and take it over for its own purposes. Whatever Congress may have had in mind, there certainly is no force in the argument that because the power to cancel was extended for six months therefore the word "cancel" must apply to Government contracts. Congress was apparently of opinion that all the powers involving the entire shipbuilding program should be extended beyond the period of peace

and so provided. The authority to build ships, to take over plants, to requisition charters, and likewise to cancel contracts, were all equally and without distinction extended beyond the peace treaty.

PROPOSITION II.

Assuming that the Act of June 15, 1917, gave the President power to cancel Government contracts, then the President never delegated such authority.

The President who signed this law and who is a part of the law making power, evidently did not understand that these words "modify, suspend, cancel," applied to Government contracts. It is hardly to be presumed that the President, with the great duties and responsibilities, which the war entailed, resting upon his shoulders, intended to examine contracts to determine whether they should be canceled or suspended. It cannot be possible that he expected to do this personally, and therefore he delegated, or at least attempted to delegate, all the powers received by him to various agencies. A portion he delegated to the Emergency Fleet Corporation, a portion to the Shipping Board, and a portion to the Secretary of the Navy.

On July 11, 1917, the President issued an executive order, delegating certain of his powers under this Act to the Emergency Fleet Corporation. The portion of this executive order which is material to this case is as follows:—

> "I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to *and in furtherance of* the construction

> of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels and the completion thereof, and all power and authority applicable to and *in furtherance* of the production, purchase and requisitioning of materials for ship construction." (Italics ours.)

On August 21, 1917, the President made an almost identical order delegating certain of his powers to the Secretary of the Navy. A reading of these orders discloses that the powers delegated were those in *furtherance* of ship construction, in *furtherance* of purchase or requisitioning of vessels, in *furtherance* of contracts for construction of vessels and the completion thereof, and in *furtherance* of the production, purchase and requisitioning of material for ship construction and war material. As the power of cancellation of a government contract cannot possibly be in *furtherance* of any of these things, it is evident that if the Act of June 15, 1917, was intended to give authority to the President to cancel government contracts, then the President never delegated such authority to anyone, but reserved it to himself. The cancellation in this case was made by the Secretary of the Navy, and in the Freygang case heard with this case, the cancellation was made by the Emergency Fleet Corporation. There is nothing in the order of cancellation to indicate or suggest that it was made under delegated power from the President. The result then is this, that even if the law did give to the President power to cancel government contracts, the Secretary of the Navy never received such power from the President, and therefore the cancellation was an unlawful one. This omission by

the President to delegate this authority, shows that he, himself a part of the lawmaking power, did not consider that the law gave him any such authority; otherwise he would have delegated that authority to some agency, it being quite inconceivable that he would himself have expected to examine thousands of contracts to determine whether or not they should be cancelled.

If it is possible to conceive of a case where the cancellation of a Government contract would be in *furtherance* of ship or material construction, then, it might be argued, that in such case the power to cancel was delegated; but that argument can not apply to this case, where the cancelation was merely to get rid of the contract and not to get it out of the way in order to substitute other contracts for other war material.

It may be argued that the power to cancel Government contracts under some circumstances was essentially for the prosecution of the war, and really in furtherance of ship or material construction. A Government contract might be for material, which, during the progress of the war had been demonstrated to be of little or no value, and some other kind of material might be substituted, which would be of greater value for war purposes. Under such circumstances, it might be necessary for the Government to cancel its own contracts in order to get such contracts for more or less useless material out of the way, and to make room for new contracts for different and more useful material. The answer to this is that the Government, without any special power, can always cancel its own contract, with the liability, of course, to pay whatever loss is sustained by reason of such cancellation. And, further, if this power be held to apply to Government contracts under the circumstances above outlined, it

cannot be held to apply to the cancellation in this case, which cancellation was not in furtherance of the war, nor in furtherance of the production of materials; was not to get rid of useless material in order to substitute more useful material; but was purely a cancellation to get the contract itself out of the way, without the substitution of anything in its place. This cancellation was made, not with any pretense that the material was not useful or that it was not the kind which the Government wanted for war purposes or that such cancellation would be in furtherance of the production of material, but was made solely to stop production entirely and to eliminate the contract completely.

We submit that these words "modify, cancel, suspend" have no application to government contracts, but apply exclusively to private contracts.

PROPOSITION III.

Assuming that the word "cancel" applies to Government as well as to private contracts, then the "just compensation" to which appellant is entitled includes anticipated profits.

The decision of the Court of Claims is based upon two propositions:

First: That portion of the law authorizing cancellation applies to government contracts.

Second: As such law does apply to government contracts, the effect is the same as if there were written in the contract a clause permitting cancellation, and therefore all question of anticipated profit is eliminated.

The vice of this argument is that it entirely overlooks the further provision of the same law to the effect that when the Government does cancel a contract it shall make "just compensation" therefor. "Just compensation" is not a new term. It appears in the Constitution itself and has been defined over and over again by this Court. And as so defined, it means a full and perfect equivalent for whatever has been taken away.

In *Monongahela Navigation Co. vs. United States*, 148 U. S. 312—the Court said:

> "The noun 'compensation' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a *full* and *perfect equivalent* for the property taken." (Italics ours.)

And again—

> "How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness—the *profits* which its use brings to the owner." (Italics ours.)

And further on—

> "But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it. The Government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the Government which takes but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

The phrase "just compensation" is spoken of as follows by the Circuit Court of Appeals for the First Circuit, in *United States vs. Town of Nahant*, 153 Fed. 520:

> "The paramount law intends that the owner shall be put *in as good condition pecuniarily* by a just compensation as he would have been if the property had not been taken." (Italics ours.)

In *United States vs. Rogers, et al.*, 257 Fed. 396, the Court said:

> "The duty and obligation to make just compensation in such a case is fundamental, and whatever is an essential element in that compensation cannot be excluded, even by legislative enactment. The question of compensation is a judicial one. (*Monongahela Navigation Co. vs. United States*, 148 U. S. 312, 327, 13 Sup. Ct. 622, 37 L. Ed. 463.)
>
> Just compensation rests on equitable principles, and it means substantially that the owner should

be put in as good position pecuniarily as he would have been if his property had not been taken."

There can be no doubt that in any ordinary case where the Government cancels its own contract, the compensation it must make includes anticipated profits.

United States vs. Purcell Envelope Co., 249 U. S. 313.

Now, this very law which, it is contended, permits the cancellation of a government contract, provides that in case of such cancellation *just compensation* shall be made. As before pointed out, these words are well defined. There is nothing ambiguous or uncertain about them; they have a certain, definite, court determined meaning, and it must be presumed that it was with this meaning in view that Congress used them. There can be no question that if the Government cancelled a private contract under this law it would be required to pay all damages sustained, including anticipated profits. This is admitted, but it is contended that in the case of cancellation of a government contract, the words "just compensation" have a different meaning and in that case do not include anticipated profits. There is no evidence in the law of any intent to give the words a different meaning in the one case than in the other. If the law applies at all to government contracts, then no distinction is made between government contracts and private contracts. If this clause is applicable to government contracts, then the law says that the government may cancel either a private contract or a government

contract, but in either case it must make "just compensation." There is no division or separation or distinction of any kind. It is all in the one sentence and in one clause. The words "just compensation" are only used once and are applicable to both kinds of contracts. How, then, can it be seriously contended that the words mean one thing if applied to one kind of contract but an entirely different thing if applied to another kind of contract?

"Just compensation" means that the person who has anything taken from him must receive a full and "perfect equivalent" for what has been taken. He must be put in "as good a position" as he was before. So that when the law says the government may cancel its contract but if it does it must make just compensation, it is exactly as if it said: The government may cancel its contract, but if it does it must give a full and perfect equivalent and must put the party in just as good a position as he would have been if the contract had not been cancelled. If the contract had not been cancelled, the appellant would have made his profit. Therefore, to put him in as good a position as he would have been, had the contract not been canceled, he must be allowed his profit.

It is submitted:

First: That this law authorizing the President to cancel contracts does not apply to government contracts.

Second: That if it does so apply, the authority to cancel Government contracts was never delegated by the President and therefore the cancellation by the Emergency Fleet Corporation was without authority and wrongful.

Third: If it does so apply, and the government can-

celled its own contract, just compensation must be made.

Fourth: In any case, anticipated profits must be allowed.

Respectfully submitted,

LOUIS TITUS,
Amicus Curiae.